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No. 03-331

In The
Supreme Court of the United States

EIE GUAM CORPORATION,

Petitioner

v.

THE LONG-TERM CREDIT BANK OF JAPAN, LTD., and THE RESOLUTION AND COLLECTION CORPORATION

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The petition for a writ of *certiorari* demonstrates that review is warranted in this case because the Ninth Circuit's ruling conflicts with the decision of this Court in *Dole Food Co. v. Patrickson*, 538 U.S. ___, 123 S. Ct. 1655 (2003), permits evasion of that decision, expands unduly federal court jurisdiction, and is also contrary to longstanding precedent of this Court concerning removal by voluntarily joined parties. Respondents contend that *certiorari* should not be granted, however, by pointing to the procedural posture of the case and attempting to disavow the conflict with *Patrickson* and other precedent. But none of respondents' arguments undermine the need for the Court's review in this case.

A. The Interlocutory Nature Of The Case Does Not Weigh Against Immediate Review Where, As Here, Later Review Is Likely Not Available

Respondents' contention (Br. in Opp. 11-12) that the Court should deny review in this case because of the interlocutory posture of the proceeding is misplaced. Later review by this Court or an appellate court following entry of a final judgment is likely not available with regard to the questions presented here concerning the erroneous rulings below refusing to remand the case to local court. The situation presented by this case is contrary to the normal rule that an appeal from a final judgment permits this Court to review all prior court of appeals' opinions preceding the judgment. Rather, this case is governed by *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), which respondents cite (Br. in Opp. 12), but misconstrue.

Caterpillar held that a party, in an appeal from a district court's final judgment after trial, could not challenge the district court's earlier order that had denied remand to a state court. The Court acknowledged that the refusal to remand had been error, but nonetheless refused to reverse. The Court explained that, because the case already had proceeded through trial in federal court and because the district court had subject-matter jurisdiction over the parties by the time of final judgment, it would

constitute an undue waste of judicial resources to vacate the district court's erroneous pretrial refusal to remand. *Id.* at 75-77. Under *Caterpillar*, the instant petition for a writ of *certiorari* is likely the only opportunity that petitioner has for review by this Court of the district court's order that refused to remand the case to local court because a nondiverse party is no longer in the case at this point in time. The refusal to remand order is properly reviewed now because there would be no undue waste of judicial resources if it were corrected pretrial and the issue was properly reviewed as part of an appeal taken under 28 U.S.C. § 1292(a)(1) from certain injunctions, Pet. App. 4a-5a, 30a-31a. *Cf. Patrickson*, 123 S. Ct. at 1659 (reviewing court of appeals' judgment that had reversed district court order refusing to remand suit to state court, where appeal was from pretrial dismissal on other grounds).

Even if further review of the questions presented were possible at some later date, petitioner will suffer irreparable injury now if it is forced to litigate the merits of this case in the district court when the case legally belongs in local Guam court. Moreover, respondents do not dispute that one of the consequences of the refusal to remand the case is the loss of petitioner's right to a jury trial on some of its claims at law. The loss of such a right warrants this Court's immediate review. *See Ex parte Simons*, 247 U.S. 231, 239 (1918) (Holmes, J.) (an order that "deprived the plaintiff of her right to a trial by jury" should be dealt with by the Court "before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by [a trial] that ultimately must be held to have been required under a mistake").[1] Even in less compelling circumstances, the Court routinely grants review in cases such as this one in which a

[1] Contrary to respondents' suggestion (Br. in Opp. 3 n.3, 11), petitioner's earlier petition for a writ of *certiorari* does not somehow weigh against granting review here. That petition was filed before respondent Resolution and Collection Corporation (RC Corporation) joined and removed the case and involved issues unrelated to the district court's subsequent refusal to remand.

court of appeals has remanded a case to a district court for trial. *See, e.g., Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. ___, 123 S. Ct. 1673 (2003).

B. The Ninth Circuit's Multi-Factor Analysis Is Inconsistent With *Patrickson* And Conflicts With Decisions Of Other Circuits

1. Respondents err in arguing that, because *Patrickson* did not decide the precise question presented here, no conflict with that decision "thus could exist." Br. in Opp. 14, 17. The decision below conflicts with this Court's decision because it is inconsistent with *Patrickson*'s rationale and that underlying rationale binds lower courts and governs future cases. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). That is particularly so here because *Patrickson* deals with the proper interpretation of the same statutory definition of "agency or instrumentality of a foreign state" in the Foreign Sovereign Immunities Act of 1976 (FSIA) that is at issue in this case – 28 U.S.C. § 1603(b). Thus, it is clear that this case warrants review because the Ninth Circuit has "decided an important federal question [under the FSIA] in a way that conflicts with [a] relevant decision[ ] of this Court." Sup. Ct. R. 10(c).

The Ninth Circuit's FSIA ruling also fosters uncertainty regarding "an important question of federal law" that concerns international commerce and "that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). *Patrickson* was informed by the need for predictability regarding agency or instrumentality status under the FSIA. The United States made clear, in a brief as *amicus curiae* at the merits stage in *Patrickson*, the importance of predictability in interpreting the language of Section 1603(b), urging the adoption of "clear and manageable rules that rest on familiar corporate law concepts." Br. for U.S. as *Amicus Curiae* Supp. Resp. 20, *Dole Food Co. v. Patrickson* (Oct. 2002). The brief emphasized that "[i]ndividuals who do business with foreign corporations

need such rules when determining whether they are dealing with entities that may be subject to the FSIA." *Ibid.* Indeed, in its earlier brief filed on petition for *certiorari* at the invitation of the Court, the United States had urged the Court to grant *certiorari* on the second question in *Patrickson*, even though that issue had "not generated a conflict among the courts of appeals," because it presented "an important issue under the FSIA in its own right," and the lower courts had not resolved the issue correctly. Br. for U.S. Supp. Pet. for Cert. 16, *Dole Food Co. v. Patrickson* (May 2002).

2. The decision below improperly expands federal court jurisdiction and sovereign immunity under the FSIA to a new category of defendants – foreign corporations that are owned by someone other than foreign states. The court of appeals concluded that a private corporation, *i.e.*, respondent Resolution and Collection Corporation (RC Corporation), qualified as an "agency or instrumentality" under the FSIA even though it failed the requirement of majority ownership of "shares" to establish such status. 28 U.S.C. § 1603(b)(2). The court relied, instead, on a multi-factor balancing analysis to hold that RC Corporation constituted an "organ of a foreign state" and thus established agency or instrumentality status. *Ibid.* That ruling is contrary to the rationale in *Patrickson* regarding the intent of Congress in the FSIA to respect corporate form. It conflicts as well with *Patrickson*'s rationale regarding the proper interpretation of the text and structure of Section 1603(b)(2) of the FSIA in light of the intent to promote certainty and predictability in matters involving foreign actors and sovereigns.

First, *Patrickson* repeatedly emphasized that the text and structure of the FSIA demonstrated that Congress intended to respect corporate form when enacting the FSIA. *See* 123 S. Ct. at 1660, 1661. Respondents have offered no possible reason why Congress would have intended background principles of corporate structure to govern the interpretation of the second phrase in Section 1603(b)(2), but not the first phrase in Section 1603(b)(2). There is no reason to think that Congress, relying on corporate structure and formalities – a reliance critical to the *Patrickson* holding – would have intended a corporation that did not meet the

relevant corporate standard to rely on a category designed for noncorporate entities. *Cf.* 123 S. Ct. at 1662 (rejecting a "control test" and affirming the "better rule," supported by "the statutory text and elementary principles of corporate law," that "[a] corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares").

Second, *Patrickson* rejected the statutory interpretation argument that respondents here press most vigorously – that by using the "disjunctive 'or' " in Section 1603(b)(2), Congress intended to allow an entity to qualify as an "agency or instrumentality" if it met any of the conditions articulated in that subsection. Br. in Opp. i, 2, 12-14, 15-16. *Patrickson* refused to divorce the statutory text from the statutory structure in that manner when it interpreted Congress's use of the word "or" elsewhere in Section 1603(b)(2).

The FSIA provides that an "agency or instrumentality" means any "entity" "which is an organ of a foreign state or political subdivision thereof, *or* a majority of whose shares *or* other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b) (emphases added). The defendant corporations in *Patrickson* (which were subsidiaries of a foreign state's instrumentality) argued, based on the second "or" emphasized above, that, even if the foreign state did not own the majority of their shares, they could still qualify as agencies or instrumentalities of the foreign state because the foreign state owned a majority of "other ownership interest" in them due to the state's "'interest' in its instrumentality's subsidiary." 123 S. Ct. at 1661. This Court rejected that argument. And, just as *Patrickson* thereby correctly refused to read the second "or" emphasized above in Section 1603(b)(2) to allow a corporation whose shares are not majority owned by a foreign state to rely on alternative means to establish agency or instrumentality status, the first "or" emphasized above in Section 1603(b)(2) cannot be read to allow a corporation that is not majority owned by a foreign state to rely on alternative means (*i.e.*, being deemed an organ) to establish agency or instrumentality status.

Third, in *Patrickson*, the Court looked to the "settled" and "formal" understanding of the terms "shares" and "owned" to determine their meaning. *Id.* at 1660. The Ninth Circuit here departed from the settled international understanding of the term "organ" at the time Congress enacted the FSIA, which generally excluded corporations, particularly corporations not owned by a foreign state. *See* Pet. 16-17. Respondents note (Br. in Opp. 17-19) that the relevant sources identify areas where international practice sometimes grants corporations immunity even when not majority-owned by a foreign sovereign. Petitioner does not dispute that proposition, but those authorities do not use the term "organ" to describe such entities. To the contrary, in the authoritative international documents to which Congress and the State Department would have turned in the 1970s when the FSIA was enacted, corporations are described as "enterprises" or "institutions," not "organs" of nation states. *See* Pet. 16-17.

3. The unpredictable nature of the Ninth Circuit's multi-factor "organ" test for a corporation that is not majority owned by a foreign state is dramatically demonstrated by the erroneous conclusion that the RC Corporation met the test in this case, as well as by the disarray that the test has created among the courts of appeals. Respondents attempt to discount the significance of the conflicting multi-factor tests applied by the various courts of appeals by claiming (Br. in Opp. 10, 19) that petitioner does not seek review of the erroneous determination of RC Corporation as an organ of a foreign state or of the test applied by the Ninth Circuit to determine organ status. But, of course, petitioner seeks review of both issues directly through the first question presented. That question, if correctly answered in the negative, requires reversal of the court of appeals' designation of RC Corporation as an agency or instrumentality of a foreign state for two reasons. First, because, as a corporation, it cannot rely on "organ" status to nonetheless qualify as an agency or instrumentality. And second, because the court of appeals was wrong to apply any test, let alone an unpredictable multi-factor balancing test, to make such a determination.

Petitioner does not seek review by the Court as to which of the conflicting court of appeals multi-factor tests is correct because none of them is. But that does not eliminate the fact that the Ninth Circuit "entered a decision in conflict with the decision" of the Fifth Circuit "on the same important matter" by applying a different multi-factor balancing analysis, such that review by this Court is warranted in this case. Sup. Ct. R. 10(a). The Fifth Circuit, which applies a five-factor analysis, acknowledged that the Ninth Circuit's six-factor analysis has not provided a "clear test." *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 847 (5th Cir.), *cert. denied*, 531 U.S. 979 (2000). In a decision issued subsequent to the filing of the petition in this case, the Third Circuit further added to the confusion when it adopted a "flexible" seven-factor analysis that combined the factors developed by the Ninth Circuit and the "similar," but not identical, set of factors looked to by the Fifth Circuit, and then added another factor that focuses on the "ownership structure of the entity." *USX Corp. v. Adriatic Ins. Co.*, No. 00-3424, 2003 U.S. App. LEXIS 19779, at *39, *40, *48 (Sept. 25, 2003). Of course, the issue addressed by the Third Circuit's new factor is already addressed directly by Congress in the second phrase of Section 1603(b)(2).

Review should be granted to prevent evasion of *Patrickson* through such lower court analysis. Indeed, the Third Circuit itself has predicted that, in response to *Patrickson*, "courts likely now will be asked to evaluate the possible organ status of a wide variety of entities controlled by foreign states through tiering arrangements and because of the widely differing forms of ownership or control foreign states may exert over entities." *Id.* at *44. Under each of the lower courts' varying "organ" tests for corporations, a court will have to inquire "in every case into the past details of a foreign nation's relation to a corporate entity in which it does not own a majority of the shares" – the very result rejected by the Court in *Patrickson*. 123 S. Ct. at 1662.

4. Respondents invoke three sentences from the United States' briefs in *Patrickson* to claim that those briefs "establish" that the "'organ' prong" in Section

1603(b)(2) is "a separate test and not at issue in *Patrickson*." Br. in Opp. 16. The briefs do not purport to set forth the United States' unequivocal view on the organ prong, although the selected sentences suggest a possibility that a corporation may be able to qualify as an organ merely by engaging in sovereign acts or functions (an inquiry notably inconsistent with the Ninth Circuit's test, and left unaddressed by respondents). Those sentences are not presented as part of any definitive governmental interpretation of the organ provision inasmuch as they are not supported by a full analysis of the statutory text, structure, or history pertinent to that provision. *Cf.* H.R. Rep. No. 94-1487, at 23, 25 (1976) (explaining that Congress modeled various provisions of the FSIA upon language from the European Convention on State Immunity); European Convention on State Immunity, May 24, 1972, Art. 27, 11 I.L.M. 470, 480 (granting sovereign immunity on the same terms as the state itself to a "legal entity" such as a corporation when it is acting in an "exercise of sovereign authority" – a provision not adopted by Congress in the FSIA).

Of course, a full examination of the question presented in this case was not submitted by the United States in *Patrickson* because, as respondents repeatedly emphasize, the precise question was not presented in that case. In light of *Patrickson*, clarification of the views of the United States on these matters may be of assistance to the Court.

C. The Ninth Circuit's Refusal To Comply With This Court's Longstanding Precedent Construing Federal Removal Statutes Also Warrants Review

Respondents attempt to evade the holding of *Cable v. Ellis*, 110 U.S. 389 (1884), and *Jefferson v. Driver*, 117 U.S. 272 (1886), through distinctions that are irrelevant or incorrect. They do not dispute that those cases hold that a party, like respondent RC Corporation, that voluntarily joins a state court action may not remove that action to federal court if the parties originally in the action could not do so. The Ninth Circuit agreed that, if this "background rule" were applied in this case, the RC Corporation

would not have been able to remove this action to federal court. Pet. App. 18a, 20a, 22a.

The Ninth Circuit cited the fact that *Cable* and *Jefferson* involved diversity jurisdiction as a reason not to rely on them, Pet. App. 22a, but the case law involving the federal removal statutes, codified next to the FSIA removal provision in Title 28 of the United States Code, is useful authority in cases involving FSIA removal. The general statute governing removal of cases involving diversity jurisdiction, 28 U.S.C. § 1441(a), certainly provides a better point of reference in cases under the FSIA involving foreign states than do the statutory removal provisions that use dissimilar language targeted at unique domestic federal entities, upon which respondents rely. *See* Br. in Opp. 26.

As interpreted in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), the FSIA does not establish exclusive federal court jurisdiction for suits in which foreign states are participants. The FSIA requires foreign states that seek to be plaintiffs in federal court to meet the typical diversity or federal question requirements, *see* 28 U.S.C. §§ 1332(a)(4), 1331, and does not provide them any "special access" to a federal forum, as respondents claim (Br. in Opp. 25 n.14). Thus, *Verlinden* did not, contrary to respondents' assertion (Br. in Opp. 22, 23), declare that the diversity standards must be ignored in FSIA cases. In *Patrickson*, the Court relied on diversity cases in interpreting the FSIA's removal provision. *See* 123 S. Ct. at 1662.

Respondents' attempt to rely on the language of the FSIA to distinguish *Cable* and *Jefferson* is futile. The general removal statute, 28 U.S.C. § 1441(a), which is undisputedly governed by the rule of *Cable* and *Jefferson*, uses the same "*any* civil action brought in a State court" language of 28 U.S.C. § 1441(d) that is relied upon by respondents. Br. in Opp. 20, 21, 26-27. The Ninth Circuit itself concluded that "the text of the FSIA removal statute does not answer this question" regarding a voluntarily joined sovereign, Pet. App. 18a, and that a "plausible reading of the statute" (*id.* at 16a) would allow it to follow the rule of *Cable* and *Jefferson*.

Respondents suggest (Br. in Opp. 28) that the prohibition in 28 U.S.C. § 1359 against collusive joinder eliminates the need to rely in FSIA cases on *Cable* and *Jefferson*'s rule. Yet, that rule has co-existed with the prohibition in Section 1359, for more than one hundred years. Indeed, the rule is particularly apt in the FSIA context because it avoids the need for a court to determine whether the motive of an agency or instrumentality of a foreign state in accepting an assignment from a private corporation was "improper[ ] or collusive[ ]" under Section 1359, and eliminates extraordinarily intrusive discovery that could be required. It thus ensures the dignity of foreign states that the FSIA was intended to protect, *see Verlinden*, 461 U.S. at 489, while preserving litigation and judicial resources by avoiding forum-shopping.

CONCLUSION

For the reasons set forth above and in the petition for a writ of *certiorari*, the petition should be granted. In the alternative, the petition for a writ of *certiorari* should be granted, the judgment below vacated, and the case remanded for further consideration in light of this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. ___, 123 S. Ct. 1655 (2003).

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